FILED
FEB 9 1904
JAMES H. McKENNEY, Clerk.

No. ~~189~~ 27

IN THE

Supreme Court

OF THE

United States.

OCTOBER TERM, 1903.

THE HELENA WATER WORKS COMPANY,
Appellant,

versus

THE CITY OF HELENA,
Appellee.

MOTION TO DISMISS APPEAL, OR TO AFFIRM, NOTICE THEREOF, AND BRIEF.

EDWARD HORSKY,
City Attorney,
EDWIN W. TOOLE,
THOMAS C. BACH,
Counsel for Appellee.

Naegele & Co., Printers, Helena, Montana.

IN THE

Supreme Court

OF THE

United States.

THE HELENA WATER WORKS COMPANY,

Appellant,

versus

THE CITY OF HELENA,

Appellee.

MOTION TO DISMISS OR TO AFFIRM.

Now comes the appellee in the above entitled suit, and moves the court to dismiss the appeal therein, for that it manifestly appears from the record, that it has no jurisdiction to hear and determine the same upon the merits thereof:

I.

The decision from which the appeal is taken is not based and does not rest upon the construction of any act of congress or interpretation of any provision of the Federal Constitution.

II.

ord that the franchise con-
pressed or implied, upon
llant, involving a Federal

It is apparent from the re
tract contains no obligation,
which the alleged error of ap
question, can rest.

III

ons invoked by appellant
the franchise contract so
this Court.

The constitutional provi
are in no wise involved unde
as to confer jurisdiction upo

IV

ith its motion to dismiss
noves the Court to affirm
from the record that the
ly, and that the question
epends is so frivolous as

Appellee, in connection
for want of jurisdiction, alsc
for that it manifestly appea
appeal was taken for delay
upon which the jurisdiction
not to need further argume

RD HORSKY,
City Attorney,

N W. TOOLE, and
AS C. BACH,
Attorneys for Appellee.

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NOTICE OF SUBMISSION OF MOTION.

To Messrs. M. S. Gunn, and Carpenter and Carpenter, Counsel for Appellant:

Please take notice that on Monday, the 22nd day of February, 1904, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

EDWARD HORSKY,
City Attorney,
EDWIN W. TOOLE,
THOMAS C. BACH,
Counsel for Appellee.

Receipt of the foregoing notice of motion, and receipt of a copy thereof, together with receipt of copies of the brief of argument therein referred to, are hereby acknowledged and admitted this 30th day of January, A. D. 1904.

M. S. GUNN,
B. PLATT CARPENTER,
STEPHEN CARPENTER,
Counsel for Appellant.

IN THE

Supreme Court of the United States.

THE HELENA WATER WORKS COMPANY,
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versus

THE CITY OF HELENA,
Appellee.

BRIEF.

In support of the foregoing motion appellee respectfully submits the following points and authorities:

I.

The pleadings and records show that on the 15th day of January, 1890, the City of Helena adopted ordinance No. 248 (Exhibit "A," Record 9), which was duly accepted by the appellant. In it was contained a franchise. Appellant claimed that said franchise contained certain "implied" obligations on the part of the city, and upon the existence of these alleged obligations and the alleged violation thereof, the right of this appeal depends. Under the organic law of the Territory of Montana its legislative assembly was at that time prohibited from passing any law "granting to any corporation, as-

sociation or individual any special or exclusive privilege, immunity or franchise whatever." The consttution and laws of the State are in line with this theory, and the laws of the territory followed the organic law.

"The legislative assembly shall not pass any local or special laws in any of the following enumerated cases, that is to say: * * * granting to any corporation, association or individual, * * * any special or exclusive privilege, immunity or franchise whatever."

Montana Const., Article V, Sec. 26.

Aside from all this, the very terms of the franchise contract emphatically declare that no such rights are conferred. While in consideration of the franchise contract it exacts certain duties of the appellant, it nevertheless expressly provides: "That nothing herein contained shall be construed so as to give to the Helena Consolidated Water Company, or its successors or assigns the exclusive right * * * of conveying, distributing or selling the same throughout the said city or of furnishing the same to the said city except as herein set forth."

Ord. 248, Fol. 18, 19, page 10.

"Nothing contained herein shall preclude said City of Helena from regrading or changing the grade of any street or streets within said city, or from the construction of maintenance of sewer work, or other works or plants

of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted."

Section 3, pages 10, 11.

"Provided, always, that said company shall not refuse to permit connections to be made by or to sell and deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the City Council of said City, and the reasonable rules and regulations of said Company."

Section 17, page 15.

"It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

Section 26, page 18.

It is manifest that there is no inhibition to prevent this provision of the franchise contract and that the parties are bound by it. There is therefore a franchise contract by which the appellant is allowed to furnish water to the inhabitants, if they desire to take it at the maximum rates fixed. This brings the question involved squarely within the decision of this Court in

> City of Joplin, appellant, v. Southwest Missouri Light Company, reported in Advance Sheet, Supreme Court of the United States Reports, December, 1903, No. 32, decided November 16, 1903.

In this case Mr. Justice McKenna, in speaking for the Court, in terse and potential language, says: "The limitation contended for is upon a governmental agency and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city cannot, the city is left with a useless potentiality, while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights, and against limitations upon the powers of government."

The substance of the decision is that, as in the case

at hand, there is neither an express or implied obligation not to put in competitive works.

II.

There is but one other question therefore left to consider: If the record shows that there is no violation of any obligation of the franchise contract upon which a constitutional question is involved, there being no act of congress applicable or to be interpreted, it logically follows that the Court will say that there is no jurisdiction except to dismiss the appeal.

This would seem to be the logical conclusion. It is a condition precedent to the exercise of jurisdiction and it would be a hard proposition to maintain that the jurisdiction could be sustained without it. It goes without saying that there is no express or implied obligation upon which to rest a constitutional question. Upon this preliminary proposition depends the jurisdiction of this Court to reach the Federal question and pass upon its merits. If there is no obligation in the franchise contract to be violated in respect to the matters contended for it cannot in reason be said that any constitutional question can possibly be involved. The whole matter is solved in the interpretation of the franchise contract and no pretension is made that any act of congress or its interpretation is involved and the jurisdictional question depends solely upon the proposition as to whether there exists any obligation to be violated.

When an appeal is taken and the error assigned is based upon the violation of one of the obligations of the contract, and it is manifest from the record that no such obligation exists, the Court has no power or jurisdiction except to dismiss the action and no inquiry into the merits can be had or required. Whether the alleged error referred to the remedy or the violation of the obligations of a contract would of course be without merit, as the condition precedent upon which it must rest does not exist. So it is apparent, there is no obligation, express or implied, upon which to predicate a constitutional question, upon which the error is assigned. Should this case go to final hearing it would seem that all this Court could do would be to dismiss the appeal, and that is just what is asked by the motion.

Conceding that notwithstanding the decisions heretofore made in this case this Court can and will consider the question of the obligations contained in the contract as germane to the jurisdictional question, it still remains a preliminary and conditional one upon which such jurisdiction depends. If it can properly be decided upon this motion, the necessity of such a speedy determination is ~~potentially~~ contingently suggested from the very nature of the controversy, and facts contained in the record. If it is apparent from the record that all that could be done upon a final hearing would be a dismissal of the appeal for want of jurisdiction, it would seem that this motion should be sustained. We have assumed, of course, if this motion

is proper, the Court upon final hearing could not affirm or reverse the judgment and enter any other order than that dismissing the appeal.

The appellee respectfully submits that the points made in this motion are fully and unequivocally sustained by the following authorities:

Moran v. Horsky, 178 U. S., 205.

St. Paul Gas Light Co. v. St. Paul, 181 U. S., 142, 147.

New Orleans Water Co. v. Louisiana Sugar Refining Co., 125 U. S., 18.

City of New Orleans v. New Orleans Water Works Co., 142 U. S., 79.

New Orleans Water Works Co. v. Louisiana, 185 U. S., 336, 345.

Mobile and Ohio Railroad Co. v. Tennessee, 153 U. S., 486.

Hamblin v. Western Land Co., 147 U. S., 532.

Wilson v. North Carolina, 169 U. S., 595.

Muse v. Arlington Hotel Co., 168 U. S., 430, 435.

Shreveport v. Cole, 129 U. S., 36.

McCain v. Des Moines, 174 U. S., 168.

If this Court is of the opinion that there is no express or implied obligation in the franchise contract,

upon which a constitutional question could rest, and that the decision of the trial and appellate court rested upon those grounds and none other, then it logically follows that it is based properly upon grounds independent of the constitutional question sought to be raised. It may be regarded as incidental in a sense to the constitutional question, yet it is preliminary to the jurisdiction and must be determined in advance whether on motion or at the final hearing. While we are not able to find authorities *directly* in point upon the question in hand, the reasoning and analogy in the cases cited seems to be so complete as to remove all doubt of their applicability and controlling effect. It would seem that the question of jurisdiction ought always to be considered and determined at any stage of the case, especially where it is presented and a ruling upon it requested.

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But little further need be said in support of the fourth ground of this motion.

The assumption that competition when not *limited* or *restricted* is taking the property of a competitor without compensation or due process of law is too absurd and contradictory to require argument to refute it. The *power* of the city under the constitution and laws to make a franchise contract reserving the right to put in competitive works and plants, cannot be doubted, and that it has done so is beyond question. It logically and emphati-

cally follows that the appeal, which depends *entirely* upon the violation of the obligations of the contract, in putting in said works, is clearly frivolous, and cannot be maintained upon the same grounds, under the facts in this case, that it was contended for below.

The correct doctrine certainly is, as announced by this Court in the Joplin case, that the right to put in such works or plants of a public nature exists without such express reservation. What then can be said of the good faith of an appeal taken and sought to be maintained in the very face of the express provision of the franchise contract that provides it shall not be exclusive, and that the city reserves the right to put in any works or plants of a public nature. And the power to cede away *such a right* necessarily remains with it as a public right, and the *power* to reserve it is simply a retention of then existing right. The act of congress involving this appeal must, of course, depend upon, whether it involves *construction* or *application* of, the Constitution of the United States. No question of constitutionality of any Federal law, or the construction of any treaty entered into under its authority, is brought in question, nor is the Constitution or the laws of the State claimed to be violated.

Appellant assumes that there is an implied contract that its franchise shall be exclusive, but the express provision of the contract is that it shall not be. It assumes that there is an implied obligation that the city will not put in its own plant or works, but the express terms of

the contract provide that the city may do so. As certain as the city possesses the power to confer the right claimed, that certain it is it could retain it, and this it has done.

The whole question, therefore, in the fourth ground of the motion, is confined to the proposition whether an appeal sought to be maintained, fairly and squarely, in the face of the primary rights of the parties, does not come within the language and meaning of the rule upon which the motion in this respect applies. We respectfully submit that it does. It goes without saying, if the franchise contract has no express or implied obligation by which the appellee is not entitled to put in a competitive plant of its own, then there is no obligation to be violated and in the very nature of things could be no taking of property without just compensation or due process of law. If, therefore, the Court should be of opinion that this question is so intimately connected with or incidental to the constitutional question that it might properly be considered upon the final hearing, we respectfully submit that the grounds upon which the constitutional question rests are absolutely frivolous and brings the case clearly within the provisions of Subdivision 5 of Rule 6 of this Court.

The Joplin case, to which we have heretofore referred, conclusively settles the legal proposition involved; besides, in this appeal it appears in the record that the franchise privileges could not be made exclusive under the Constitution and laws of the State, and by the express

provisions of the contract itself no such rights are conferred or intended to be conferred. Aside from this it is expressly provided, as we have seen, that it shall not be exclusive or prevent appellee from constructing or maintaining sewers or other works or plants of a public nature.

We take it that this rule of Court was intended to meet a case like this, where a corporation had secured the suspension of the exercise of the powers and privileges of a city to install water works of its own. If the case presents one that is frivolous and cannot be maintained, this motion will be granted and the rights secured to the city afforded to it; otherwise great and serious injustice might result.

Respectfully submitted,

EDWARD HORSKY,
City Attorney,
EDWIN W. TOOLE,
THOMAS C. BACH,
Counsel for Appellee.